Supreme Court, U.S.
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No. - _____

In The___
Supreme Court Of The United States

MARTIN S. MCKAY,

Petitioner,

UNITED STATES OF AMERICA,

Intervenor,

v.

BROOK THOMPSON,
Individually and as
Coordinator of Elections,
State of Tennessee,

RILEY C. DARNELL,
Secretary of State,
State of Tennessee,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the right to vote and the free exercise of religion constitute a hybrid right which is constitutionally protected, as per previous decisions of this court ?

2. When considering a motion for summary judgement and evaluating a claim of unconstitutional burdening of the right to vote pursuant to Section 1983 (42 U.S. § 1983) where such claim is for both injunctive relief and money damages, and where the Respondents (movant) have had the state legislature modify the statutory scheme during the course of litigation to seemingly render the question of injunctive relief moot; should the district court have deemed such modification as an admission by Respondent's that Petitioner's right to vote had been unlawfully and unconstitutionally denied without due process of law in light of the fact that Respondents never filed an answer to the complaint denying the allegations contained therein ?

3. When considering a motion for summary judgement and evaluating a claim of unconstitutional burdening of the right to vote pursuant to Section 1983 (42 U.S. § 1983) where such claim is for both injunctive relief and money damages, and where the Respondents (movant) have had the state legislature modify the statutory scheme during the course of litigation to seemingly render the question of injunctive relief moot, does Petitioner still have a valid claim for money damages to include recovery of costs, etc. ?

4. When considering a motion for summary judgement does a district court have jurisdiction even though it has failed to certify the matter to the Attorney General of the United States as required pursuant to 28 U.S.C. § 2403(a) because

the constitutionality of an act of Congress has been "drawn in question ?

5. When a circuit court of appeals has determined that a technical violation of 28 U.S.C. § 2403(a) has occurred, does it have discretionary authority not to remand the matter back to the district court ?

6. When considering a motion for summary judgement under rule 56(c) of the *Fed. R. Civ. P.* where Petitioner's attorney of record (nonmovant) did not respond, is such motion "properly supported" when the Respondent's (movant) have not filed an answer to the complaint denying the allegations contained therein ?

7. W hen considering a motion for summary judgement under rule 56(c) of the *Fed. R. Civ. P.* where Petitioner's attorney of record (nonmovant) did not respond, is less than four (4) months time considered "ample opportunity" for discovery when the Respondent's (movant) have not filed an answer to the complaint denying the allegations contained therein so that Petitioner would know what issues he needed to prove to meet the "affirmative burden" placed upon him ?

8. When considering a motion for summary judgement under rule 56(c) of the *Fed. R. Civ. P.* where the Petitioner's attorney of record (nonmovant) did not respond, does the district court have a duty to apply rules 8(d) and 12(a)(1)(A) of the *Fed. R. Civ. P.* when the Respondent's (movant) have not filed an answer to the complaint denying the allegations contained therein ?

9. Did the courts below err by finding that TENN. CODE ANN. § 2-2-116 meets the "grandfather exception" of Section 7(a)(2) of the Privacy Act of 1974 by "weighing the

evidence" and "determining the truth of the matter" at the summary judgement stage of litigation ?

10. When evaluating a claim pursuant to the Civil Rights Act of 1964 (42 U.S.C § 1971) where a private party is seeking to enforce a statutory right, is the statute enforceable by such private party through Section 1983 (42 U.S.C § 1983) or through the *Ex Parte Young* (209 U.S. 123 (1908)) exception to states' immunity ?

11. When evaluating a claim pursuant to Section 7 of the Privacy Act of 1974 (Public Law 93-579) where a private party is seeking to enforce a statutory right, is the statute enforceable by such private party through Section 1983 (42 U.S.C § 1983) or through the *Ex Parte Young* (209 U.S. 123 (1908) exception to states' immunity ?

12. Does Petitioner's attorney of records' failure to respond to the motion for summary judgement out weigh the error by the district court in determining that Section 7 of the Privacy Act of 1974 afforded no possibility of injunctive relief, as asserted by the Sixth Circuit Court of Appeals ?

13. Did the courts below err, by operation of law and/or general principles of statutory construction, because the Civil Rights Act of 1964 is "not submerged by a later enacted statute covering a more generalized spectrum" (*Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)), in development of the analytical framework to determine whether Tennessee met the grandfather exception to Section 7 of the Privacy Act ?

14. Did the courts below err, by operation of law and/or general principles of statutory construction, because the Civil Rights Act of 1964 and the Privacy Act of 1974 are "not

submerged by a later enacted statute covering a more generalized spectrum" (*Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)), in development of the analytical framework to determine what is prohibited by NVRA as "the minimum amount of information necessary" (42 U.S.C. § 1973gg-3(c)(2)(B)) in the case of registering to vote while obtaining a driver license, or, "such identifying information ... as is necessary to enable the appropriate State election official to assess the eligibility of the applicant" (42 U.S.C. § 1973gg-7(b)(1)) in the case of registering to vote when utilizing a mail-in voter registration form ?

15. Did the courts below err by finding that Petitioner's right to vote is not unconstitutionally burdened by TENN. CODE ANN. § 2-2-127 and TENN. CODE ANN. § 2-2-138 by requiring public disclosure of SSN when these statutes are collectively applied to this fact situation ?

16. Has Petitioner's rights under the due process of law clauses and the privileges and immunities clauses been violated by the Respondent's in light of the fact that the courts below have erred on the questions presented herein ?

PARTIES TO THE PROCEEDING

The parties before this Court are those set forth in the caption.[1]

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[1] Additional parties appear on the caption to the opinion rendered by the U.S. Sixth Circuit Court Of Appeals. These parties were defendants before the District Court and were subsequently voluntarily dismissed. These parties were not appellees before the Sixth Circuit. These parties are: CAROLYN JACKSON, Administrator Of Elections, Hamilton County, Tennessee, and CLAUDE RAMSEY, County Executive, Hamilton County, Tennessee. Further, the Intervenor – UNITED STATES OF AMERICA was not a party to the proceeding before the District Court. The Intervenor was added to the proceeding before the Sixth Circuit upon certification to the Attorney General as per 28 U.S.C. 2403(a).

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Martin S. McKay respectfully petitions for a writ of certiorari to review the judgement of the United States Court Of Appeals For The Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported as *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000) (App. 3a). The judgement of the district court is unreported (App. 13a) and the opinion of the district court is unreported (App. 15a).

STATEMENT OF JURISDICTION

The Sixth Circuit entered its judgement on September 18, 2000 (App. 3a), and denied the Petition For Rehearing With Suggestion For *En Banc* Determination on October 27, 2000 (App. 1a). The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Relevant statutory provisions are set forth in the Appendix at 42a – 46a.

Federal statutory provisions are *Intervention By United States* (28 U.S.C. § 2403(a)), the *Civil Rights Act of 1964* (42 U.S.C. § 1971(a)(2)(B)), the *Privacy Act of 1974, Section 7* (P.L. 93-579 § 7), and the *National Voter Registration Act of 1993* (42 U.S.C. § 1973gg), sub-sections 3(c)(2)(B) and 7(b)(1), and 42 U.S.C. § 1983.

Tennessee statutory provisions are *Qualified Voter* (TENN. CODE ANN. § 2-2-102), *Registration Form* (TENN. CODE ANN. § 2-2-116), *Permanent Registration Records Open To Inspection* (TENN. CODE ANN. § 2-2-127), *Voter*

Registration Lists – Purchase By Citizens (TENN. CODE ANN. § 2-2-138)

Further, certain provisions of the U.S. Constitution are also at issue in this matter. They are, the *Due Process* clauses of the *Fifth* and *Fourteenth* Amendments, the *Privileges And Immunities* clauses of *Article 4 § 2* and the *Fourteenth* Amendment, the *Free Exercise Of Religion* clause of the *First* Amendment, as well as Petitioner's claim that his right to vote was unconstitutionally burdened.

STATEMENT OF THE CASE

On October 14, 1998, Petitioner filed suit in district court in an effort to compel the Respondents to register him to vote without providing his Social Security Number ("SSN"). This action was commenced after repeated attempts in the Summer and Fall, 1998, to work through this issue with the administrative component of the Tennessee election apparatus (for a complete chronology of events, see App. 17a-20a). On October 29 and 30, 1998 the district court held a hearing for preliminary injunction, subsequently denying plaintiff's motion on November 2, 1998.

After the preliminary injunction hearing Petitioner's attorney of record apparently did not follow through on several issues including responding to the Respondent's motion for summary judgement. On October 29, 1999, the district court entered an order granting summary judgement in favor of Respondent's. At this point, Petitioner personally assumed responsibility for prosecution of the matter and timely filed a Notice of Appeal on November 19, 1999.

On September 18, 2000, the U.S. Sixth Circuit Court of Appeals rendered a decision in the matter unfavorable to

Petitioner (App. 3a), although finding that there were certain errors embodied within the case (App. 11a). On October 27, 2000, the Sixth Circuit denied Petitioner's request for rehearing (App. 1a).

A. Proceedings In The District Court

As already stated, Petitioner's attorney of record erred in his failure to follow through on several issues pertinent to this matter. First among these was his failure to file an amended complaint after the district court granted leave to do so (App. 40a). Second, he failed to file a motion for default judgement after being put on notice by the district court that the Respondent's had not yet filed an answer to the complaint (App. 41a). Third, he failed to adequately prosecute the matter after the scheduling conference on February 19, 1999 by making no effort to conduct discovery as required by *Fed. R. Civ. P.*, although there is arguably a valid reason (see discussion under item two on pp. 7-8 herein). Fourth, he failed to respond to the motion for summary judgement filed by the Respondent's.

Additionally, the Respondent's did not file an answer to the complaint. Even when they were put on notice by the district court that they needed to answer the complaint, they failed to do so. Further, the district court failed to certify the matter to the Attorney General as required pursuant to 28 U.S.C. 2403(a).

B. Proceedings In The Sixth Circuit Court Of Appeals

After the briefing process had been concluded before the Sixth Circuit the United States intervened as of right pursuant to 28 U.S.C. § 2403(a) by order of the Court entered on July 20, 2000.

On September 18, 2000, the Sixth Circuit rendered a decision unfavorable to Petitioner while acknowledging that the district court had erred on at least two (2) material issues in its disposition of the case (App. 10a-11a). First, is whether a district court has jurisdiction to consider a motion for summary judgement when it has failed to certify the matter to the Attorney General of the United States as required by 28 U.S.C. 2403(a) (App. 42a). Second, is whether the Petitioner's attorney of record's failure to respond to the motion for summary judgement out weighs the error by the district court in determining that Petitioner could have no injunctive relief pursuant to the Privacy Act of 1974, Section 7 (App. 43a).

Additionally, Petitioner believes that the Sixth Circuit erred in its disposition of the case because they declined to entertain material questions of fact (App. 7a), which they believe were raised inappropriately for the first time in Petitioner's reply brief. However, the position of the Sixth Circuit in this regard is erroneous. In their response brief the Respondent's asserted that the district court had "correctly determined" that the State Defendant's fell within the statutory exception to Section 7 of the Privacy Act. Petitioner simply pointed out in his reply brief to the Sixth Circuit that the Respondent's had not filed an answer to the original complaint, therefore, the district court could not have "correctly determined" anything in its consideration of the motion for summary judgement because it failed to apply rules 8(d) and 12(a)(1)(A) of the *Fed. R. Civ. P.* which require that the allegations contained within the complaint are to be "deemed admitted" if they are not denied.

REASONS FOR GRANTING THE WRIT

In light of the fact that the right to vote is the most fundamental and basic right which we enjoy as American citizens today, passed down to us by our forebears, it is no small matter when that right is denied by a State for the declination of a citizen to provide his SSN. Particularly, when such disclosure specifically violates numerous federal statutory and constitutional provisions designed to protect that right. Made all the more alarming by the fact that the Respondents simply do not care that they are in violation of numerous federal statutes.

Further, in light of the recent U.S. Presidential election dispute in Florida, *Bush v. Gore*, 531 U.S. ___ (Slip Op. 2000), it becomes abundantly clear that every vote does count and when that right is denied it should be for the utmost reasons of strict scrutiny, which the Respondents and the courts below have failed to understand and recognize. For the reasons stated herein, Petitioner believes that the questions presented are of paramount national and public importance in light of the debacle which the nation and the State of Florida experienced most recently.

I.

THE DECISION OF THE SIXTH CIRCUIT REGARDING JURISDICTION OF THE DISTRICT COURT WHEN IT FAILED TO CERTIFY THE MATTER TO THE ATTORNEY GENERAL IS ERRONEOUS.

The finding by the Sixth Circuit that a technical violation of the requirement to certify the matter to the U.S. Attorney General as per 28 U.S.C. § 2403(a) (App. 42a) did occur but declining to hold that the district court was without jurisdiction (App. 11a, relying on *Wallach v. Lieberman*, 366 F.2d 254 (2nd Cir. 1966)) is erroneous. The language of the

statute is clear, concise and unambiguous, "the court shall certify such fact to the Attorney General". The word "shall" in this context means that the court has a duty to certify the matter, it is not open to interpretation and/or discretion as both the district court and the Sixth Circuit seem to believe. Petitioner submits that the district court was without jurisdiction to consider the motion for summary judgement because it failed in its duty regarding this issue. As such, on finding the existence of a technical violation the Sixth Circuit should have remanded the matter back to the district court.

The Constitution and constitutional laws of the United States are the supreme law of the land. U.S. CONST., art. 6, § 2. When a decision by a court is in conflict with such law then its decision is *ultra vires*, void, of no effect. As a result of its unconstitutional arrogation of power the U.S. Sixth Circuit's decision is a nullity. The language of the statute, being neither vague nor ambiguous, requires that the judgement of the district court be vacated and remanded for proper proceedings.

Petitioner is unable to locate a citation where this court has considered this statute in this particular context. As this issue is material to determining Petitioner's claims regarding his most basic right to vote, this court should grant certiorari on questions four (4) and five (5) of this petition.

II.

THE DECISIONS OF THE COURTS BELOW REGARDING APPROPRIATE CRITERIA WHEN CONSIDERING A MOTION FOR SUMMARY JUDGEMENT UNDER RULE 56(c) ARE ERRONEOUS.

The courts below have held that the motion for summary judgement filed by the Respondents was "properly supported".[2] The district court further held that "courts do not have a responsibility to search *sua sponte* the record for genuine issues of material fact" (App. 17a). Also, this court has indicated that "we assume that both parties have had ample opportunity for discovery". *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,250 n5 (1986).

Petitioner agrees with the district court's observation that it does not have a responsibility to "search *sua sponte* the record", however, the court does have a responsibility to determine if "genuine issues of material fact" exist. Rule 7(a) of the *Fed. R. Civ. P.* states that "There shall be a complaint and an answer...". At a minimum, when determining whether there is a genuine issue of material fact, the district court has a responsibility to at least refer to the answer filed in response to the complaint in an effort to determine whether any admissions or denials are present and/or contained within the record. To rely solely upon the memorandum of law which was filed by the Respondents in support of the motion for summary judgement, is tantamount to accepting the equivalent of "allegations" without having an obligation to

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[2] The district court stated that "Defendants filed a brief in support of their motion" (App. 16a) and held that the nonmovant "must come forward with some significant probative evidence to support its claim" (App. 16a-17a). The Sixth Circuit held that "when McKay failed to respond to the motion for summary judgement, he defaulted on his duty to produce affirmative evidence" (App. 7a). Further, this court has held that "when a properly supported motion for summary judgement is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial" (footnotes and internal quotations omitted). *See Anderson v. Liberty Lobby, Inc*, 477 U.S. 242,250 (1986).

meet its burden of showing that there is "no genuine issue of material fact". *See Celotex Corp. v. Catrett*, 477 U.S. 317,323 (1986) (discussing movant's burden in making a summary judgement motion). Petitioner submits that the motion for summary judgement was not "properly supported" considering the absence of an answer to the complaint.

Petitioner notes that the scheduling conference was conducted on February 19, 1999 (App. 37a). Per the scheduling order entered on February 26, 1999 (App. 37a) the discovery planning meeting took place on March 18, 1999 and set the completion date for all discovery at July 12, 1999. Thus, leaving less than four (4) months available to conduct all discovery, including the taking of depositions by expert witnesses if necessary. Petitioner submits that there was not sufficient time to adequately conduct discovery in less than four months (*see Anderson* at 250 n5) when Petitioner had no way of knowing which items were in dispute, this because the Respondents did not file an answer to the complaint. How could Petitioner have been sure what items he needed to prove through the discovery process in order to determine which items were "genuine issues of material fact" for purposes of the summary judgement motion in order to meet his "duty to produce affirmative evidence" (App. 7a) ?

Further, in the absence of an answer to the complaint, the courts below failed to apply rules 8(d) and 12(a)(1)(A) in consideration of the motion for summary judgement. These rules collectively stipulate that if an answer is not filed within twenty (20) days then the averments contained in the complaint are "admitted". Also, the Respondent's were put on notice by the district court that they needed to file an answer to the complaint (App. 40a). However, even with this reminder, the Respondent's failed to answer the complaint. The federal courts have recognized that where the complaint

has not been answered the facts and averments contained in the complaint are presumed to be true when considering a motion for summary judgement.[3] Petitioner discussed above that this particular issue was the item which the Sixth Circuit "declined to entertain" because it was "raised for the first time in McKay's reply brief" (App. 7a). The response brief before the Sixth Circuit by the Respondent's asserted that the district court had "correctly determined" that the State Defendant's fell within the statutory exception to Section 7 of the Privacy Act. Petitioner simply pointed out in his reply brief to the Sixth Circuit that the Respondent's had not filed an answer to the original complaint, therefore, the district court could not have "correctly determined" anything in its consideration of the motion for summary judgement because it failed to apply rules 8(d) and 12(a)(1)(A) of the *Fed. R. Civ. P.*

The district court held that TENN. CODE ANN. § 2-2-116 "falls within the section 7(a)(2) exception for a system of records [requiring the disclosure of one's SSN] in existence and operating before January 1, 1975 ..." (App. 25a). The Sixth Circuit affirmed this finding (App. 7a). The holding of the courts below is in sharp contrast to the stated purpose of a summary judgement motion and the district court's function and associated responsibility therein. The judge's function in the district court "is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial" (*see Anderson* at 249). As such, it becomes clear that the court's below have erred in

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[3] In the case of *Creedon v. Bowman*, 75 F.Supp. 265 (1948), the court cites dicta from *Williams v. Walnut Park Plaza, Inc.*, 68 F.Supp. 957 (1946), which recognizes this construction. "Since no answer has been filed ... all facts well pleaded in the complaint must be presumed to be true." *See Creedon* at 267 and *Williams* at 959.

this finding. Even if the district court were to hold that there was "no genuine issue of material fact", it simply should have been left at that. However, the court went on to declare that Tennessee met the grandfather exception to Section 7(a)(2). Petitioner submits that the district court exceeded the scope and function of its authority by doing such at the summary judgement stage of litigation.

Assuming arguendo, that a district court were to find "no genuine issue of material fact" it should then only grant summary judgement, not proceed to make a "declaratory judgement" as to the "truthfulness" of the assertion by the Respondent's that they meet the grandfather exception. In such a scenario, the district court would have acted within the scope of its authority at this stage of the litigation. However, by acting as though it were "weighing the evidence" and "determining the truth of the matter", the district court erred by declaring that Tennessee met the grandfather exception. In effect, the district court was acting as though it were a "fact finder at trial" at an inappropriate stage of the litigation. Petitioner submits that even if this court should hold that he should not prevail on his Privacy Act claim, this court should still reverse the finding of the courts below that Tennessee meets the grandfather exception because such finding is a result of the courts below having exceeded their authority at the summary judgement stage of litigation.

Petitioner is unable to locate a citation where this court or the several Courts of Appeals have considered these particular issues – 1.) whether a summary judgement motion is "properly supported" in the absence of an answer to the complaint, 2.) whether less than four months is "ample opportunity" to conduct discovery in the absence of an answer to the complaint, 3.) whether rules 8(d) and 12(a)(1)(A) should be applied in consideration of a motion

for summary judgement in the absence of an answer to the complaint (or other responsive pleading), and 4.) whether the district court exceeded the scope and function of its authority by making a declaratory statement (i.e.-"judgement") that Tennessee met the grandfather exception to Section 7(a)(2) of the Privacy Act. As these issues are material in determining Petitioner's claims regarding his most basic right to vote, this court should grant certiorari on questions six (6), seven (7), eight (8), and nine (9) of this petition.

III.

THE DECISIONS OF THE COURTS BELOW REGARDING ENFORCEMENT OF THE CIVIL RIGHTS ACT OF 1964 CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT.

The courts below have held that Petitioner lacks standing to enforce a provision of the Civil Rights Act of 1964 (42 U.S.C. § 1971(a)(2)(B)) because this provision is enforceable by the Attorney General (42 U.S.C. § 1971(c)) (see statute at App. 42a-43a). *See App. 8a for the Sixth Circuit holding and App. 27a-28a for the district court holding on this issue.*

In holding that Petitioner cannot enforce this provision of the Civil Rights Act the courts below are in direct conflict with previous decisions of this court. In *Blessing v. Freestone*, 520 U.S. 329, 338 (1997), this court held that where there is an enforceable statutory right with no provision for private remedy, such a right may be enforced by private actors through section 1983 (42 U.S.C. § 1983), citing *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509 (1990). Also, in *Wilder* this court further held that,

"only when the statute itself creates a remedial

> scheme that is sufficiently comprehensive ... to demonstrate congressional intent to preclude section 1983 actions, is such an action foreclosed." [internal quotations omitted] *See Wilder* at 521.

Additionally, in *Blessing* this court held that where a statute "contains no private remedy – either judicial or administrative – through which aggrieved persons can seek redress", relief is available through section 1983. *See Blessing* at 348.

Section 1971 of the Civil Rights Act contains no provision or remedial scheme for private enforcement, through either judicial or administrative avenues. Neither the courts below (App. 27a), nor do the Respondents, deny that there is an enforceable statutory right, they simply hold that Petitioner lacks standing to enforce this right. The district court even ackowledged that "McKay makes a persuasive argument that his SSN is not material to determining his qualification for voting; and therefore, his omission of that information cannot be grounds for refusing his registration" (App. 27a). Petitioner submits that this provision of the Civil Rights Act of 1964 is enforceable through section 1983 as per previous decisions of this court.[4]

However, even if this court should determine that section 1971 is not enforceble through section 1983, there are other avenues through which section 1971 can be enforced. Specifically, this court has long held that "the Constitution and constitutional laws of the [United States are] the supreme

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[4] Contrary to the assertion of the Sixth Circuit in footnote 5 of its opinion (App. 11a-12a), Petitioner has never argued that the Civil Rights Act violation should have been certified to the Attorney General because its constitutionality had been "drawn in question". Petitioner simply argued for enforcebility through section 1983.

law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation." *See Ex Parte Siebold*, 100 U.S. 371, 399 (1879); *see also Millken v. Bradley*, 418 U.S. 717, 744 (1974). "The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every state owes obedience, whether in his individual or official capacity." *See Siebold* at 392.

Appropriately, this court has held that there is an exception to states' immunity from suit for just such a situation. In *Ex Parte Young*, 209 U.S. 123 (1908), this court held that a "state official" may be enjoined from violating federal law. The concept of the *Ex Parte Young* exception is that a suit against a state officer is not a suit against the state when the remedy sought is an injunction against an illegal action, for an officer is not acting on behalf of the state when he acts illegally. Therefore, a state officer is effectively stripped of his character as an agent of the state when he acts illegally, thus, allowing an action to ensue.

Regardless of which enforcement mechanism this court determines is applicable to section 1971, either section 1983 or the *Ex Parte Young* exception, it is clear that the Respondent's are in violation of the Civil Rights Act of 1964. They do not deny this fact.

Petitioner is unable to locate a citation where this court or the several Courts of Appeals have considered this statute (other than the instant matter by the Sixth Circuit). As this issue is material in determining Petitioner's claims regarding his most fundamental right to vote, this court should grant certiorari on question ten (10) of this petition.

IV.

THE DECISIONS OF THE COURTS BELOW REGARDING ENFORCEMENT OF SECTION 7 OF THE PRIVACY ACT OF 1974 CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT.

The courts below have adopted different perspectives on the enforceability of Section 7 of the Privacy Act of 1974. The district court held that the Eleventh Amendment "precludes an action by McKay against Defendants in their official capacities" (App. 27a). The Sixth Circuit held that the district court "erred in adopting the defendant Tennessee officials' position that the Eleventh Amendment immunity barred McKay from gaining any relief for his claims under federal law because prospective injunctive relief was possible for him in theory". (App. 11a, citing *Lawson v. Shelby County, Tenn.*, 211 F.3d 331, 335 (6th Cir. 2000)). The Sixth Circuit in *Lawson*, which was decided after the briefing process was concluded in the instant matter, determined that prospective injunctive relief is permitted under the *Ex Parte Young* exception to states' immunity, as well as declaratory relief and costs because they are ancillary to prospective injunctive relief. *See Lawson* at 335.

Both Petitioner and Intervenor presented argument before the Sixth Circuit that section 1983 relief was available to enforce Section 7 of the Privacy Act. This because, in the words of the Intervenor, "where, as here, a statute by its terms applies to state actors, creates enforceable rights and contains no remedies to enforce such rights, § 1983 relief should be available."[5] Further, for the same reasons that

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[5] Brief of Intervenor before the Sixth Circuit on appeal, p. 12. Intervenor's brief is not in the Appendix to this petition.

Petitioner presented above regarding the Civil Rights Act claim, when citing both *Blessing* and *Wilder*, Section 7 of the Privacy Act "contains no private remedy – either judicial or administrative – through which aggrieved persons can seek redress" (*see Blessing* at 348) and therefore such a right may be enforced by private actors through section 1983 (*see Wilder* at 509).

In the instant matter the Sixth Circuit adopted the precedent from *Lawson* that the *Ex Parte Young* exception to states' immunity should apply to Section 7 of the Privacy Act. However, since Petitioner's attorney of record did not respond to the motion for summary judgement, Petitioner had "defaulted on his duty to produce affirmative evidence" (App. 7a). Apparently, the Sixth Circuit has held that this "default" out weighs the technical error made by the district court in determining whether prospective injunctive relief was available through Section 7 of the Privacy Act because "the district court's error does not affect the outcome of this case" (App. 11a).

Also, as the Intervenor pointed out before the Sixth Circuit,[6] the district court explained that it must "ask two questions: first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power" (App. 26a). The district court did not reach the second question. Because it held that the Privacy Act did not abrogate state immunity it determined that the Respondent's were immune from suit. Petitioner submits that when a district court has erred (as in this illustration), even considering that a response to the motion for summary judgement was not filed, the standard of a "duty to produce

[6] Brief of Intervenor, p. 4 (not in Appendix to petition).

affirmative evidence" should be subordinate to the Sixth Circuit finding of technical error by the district court.

The courts below have erred in development of the analytical framework concerning statutory construction of Section 7 of the Privacy Act. However, neither court considered the fact that "a specific statute will not be controlled or nullfied by a general one, regardless of the priority of enactment". *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), citing *Morton v. Mancari*, 417 U.S. 535, 550-551. Therefore, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum". *See Radzanower* at 153. Further, "when two statutes are capable of co-existence, it is the duty of courts ... to regard each as effective". *See Radzanower* at 155. By ignoring the Civil Rights Act prohibition of requiring SSN in development of the statutory construction of Section 7 of the Privacy Act, the courts below have erred. Just because the courts below have determined that Petitioner cannot enforce the Civil Rights Act the statute should not be taken as being "incapable of co-existence" with the Privacy Act because it is not "nullified ... regardless of the priority of enactment".

Petitioner is unable to locate a citation where this court has considered Section 7 of the Privacy Act of 1974. Petitioner notes that the Ninth Circuit has adopted the position that Section 7 of the Privacy Act does not apply to state actors. *See Dittman v. California*, 191 F.3d 1020, 1028-29 (9th Cir. 1999); relying on and citing *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir. 1983). As these issues are material in determining Petitioner's claims regarding his most fundamental right to vote, this court should grant certiorari on questions eleven (11), twelve (12), and thirteen (13) of this petition.

V.

THE DECISIONS OF THE COURTS BELOW REGARDING APPLICABILITY AND STATUTORY CONSTRUCTION OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ARE ERRONEOUS AND ALSO CONFLICT WITH PREVIOUS DECISIONS OF THE FOURTH CIRCUIT.

The courts below have held that the National Voter Registration Act of 1993 ("NVRA") does not prohibit the Respondent's from requiring SSN as a pre-requisite to registering to vote.

The district court concluded that "a SSN falls within the minimum amount of information necessary to, ... enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process" (App. 24a). The court held in this manner because it reasoned that the Respondent's needed the SSN to "administer voter registration and other parts of the election process" (App. 23a), and therefore, was not more than the "minimum amount of information necessary".

The Sixth Circuit held that "The NVRA does not specifically forbid use of social security numbers" (App. 8a). The court reasoned that since NVRA is more general than the Privacy Act of 1974 about what information may be required, then it logically followed that "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum", (App. 8a), citing *Radzanower* at 153.

In development of the analytical framework for statutory construction of NVRA as it relates to registering to

vote while obtaining a driver license (42 U.S.C. § 1973gg-3(c)(2)(B)) (App. 44a), and while registering to vote utilizing a mail-in voter registration form (42 U.S.C. § 1973gg-7(b)(1)) (App. 44a), the courts below have erred. The district court's holding applies to registering while obtaining a Tennessee driver license. The Sixth Circuit's holding applies to that situation as well as while registering to vote while utilizing a mail-in voter registration form. Petitioner's complaint addressed 42 U.S.C. § 1973gg-3(c)(2)(B) and during the hearing for preliminary injunction the parties made a stipulation (App. 47a) that the mail-in registration form was used, therefore, 42 U.S.C. § 1973gg-7(b)(1) is under consideration as well.

The district court determined that Petitioner could not enforce either the Civil Rights Act or the Privacy Act, therefore, NVRA was to "stand on its own", so to speak. The Sixth Circuit determined that Petitioner could not enforce the Civil Rights Act but could enforce the Privacy Act, therefore, NVRA's statutory construction was based on the finding that the Respondent's met the grandfather exception of requiring SSN pursuant to Section 7(a)(2).

The reasoning of both courts is flawed. Neither court considered the fact that "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment". *See Radzanower* at 153. Further, "when two statutes are capable of co-existence, it is the duty of the courts ... to regard each as effective". *See Radzanower* at 155. By ignoring the Civil Rights Act prohibition of requiring SSN in development of the statutory construction of NVRA, the courts below have erred. Just because the courts below have determined that Petitioner cannot enforce the Civil Rights Act it should not be taken as

being "incapable of co-existence" with NVRA because it is not "nullified ... regardless of the priority of enactment".

As such, when the courts below were constructing the statutory framework of what is "the minimum amount of information" and what is allowed under "administration of other parts of the election process" , etc., they should have utilized the provision from the Civil Rights Act of 1964 to make this determination. Petitioner submits that when this court considers the correct analytical framework for development of the statutory construction relative to these two (2) provisions of NVRA, it will reach a much different conclusion and determine that NVRA does prohibit requiring disclosure of SSN as a pre-requisite to registering to vote.

Petitioner is unable to locate a citation where this court or any of the several Courts of Appeals have considered these statutory provisions (other than the instant matter by the Sixth Circuit). As these issues are material in determining Petitioner's claims regarding his most fundamental right to vote, this court should grant certiorari on question fourteen (14) of this petition.

VI.

THE DECISIONS OF THE COURTS BELOW REGARDING THE UNCONSTITUTIONAL BURDENING OF PETITIONER'S RIGHT TO VOTE ARE ERRONEOUS AND CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT AS WELL AS THE FOURTH CIRCUIT.

The courts below have erred by holding that Petitioner's right to vote has not been unconstitutionally burdened (Sixth Circuit - App. 9a, district court – 29a-31a). The Sixth Circuit simply said "we reject McKay's first claim

that his fundamental right to vote was unconstitutionally burdened by the social security number requirement" (App. 9a). The court cites *Greidinger v. Davis*, 988 F.2d 1344, 1352-54 & n. 10 (4th Cir. 1993). In *Greidinger* the Fourth Circuit held that the right to vote was unconstitutionally burdened because Virginia routinely disclosed SSN to citizens and organizations that purchased lists of registered voters. In the instant matter, TENN. CODE ANN. § 2-2-127 (App. 45a) provided for the same disclosure of SSN as did Virginia at the time this suit was filed. On April 12, 1999, Tennessee modified the statute to redact SSN from a subset of voter registration lists, those that are stored on a computer as of that date (App. 45a-46a).

The Sixth Circuit did not explain why they rejected Petitioner's claim. Even if Petitioner's right is not now unconstitutionally burdened, his right to vote in 1998 was burdened. Therefore, the Sixth Circuit should have at least remanded the matter for determination of damages. Also, in light of the fact that Respondent's modified the statutory scheme during the course of the litigation and never filed an answer to the complaint, Petitioner submits that the courts below should have deemed such action as an admission by Respondent's that they had indeed unconstitutionally burdened Petitioner's right to vote in 1998 when considering the motion for summary judgement.

Further, a close reading of the revision to TENN. CODE ANN. § 2-2-127 yields the conclusion that there is still an unconstitutional burdening of Petitioner's right to vote. The revised statute states in pertinent part, as follows,

> "a registrar shall make a reasonable effort to redact a person's social security number from a record before such record is made available to any person other

> than the holder of the number if such record is stored in computer readable format on April 12, 1999." (App. 46a)

The Respondent's conveniently did not address how a registrar should handle SSN for records which were not stored on a computer before April 12, 1999 and those that would be stored on a computer after April 12, 1999. Do the Respondent's have a record of exactly which records were stored on a computer on that specific date ? Likely, they do not. Further, TENN. CODE ANN. § 2-2-138 (App. 46a) places a duty on each county in Tennessee with a population greater than 180,000 persons to publish a listing of registered voters.

Petitioner is unable to locate a citation where this court has considered this specific set of circumstances within the context of the right to vote. As these issues are material in determining Petitioner's claims regarding his most fundamental right to vote, this court should grant certiorari on questions two (2), three (3), and fifteen (15) of this petition.

VII.

THE DECISIONS OF THE COURTS BELOW REGARDING PETITIONER'S HYBRID RIGHT CLAIM ARE IN CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT.

The courts below have held that Petitioner's hybrid right claim, that of free exercise of religion when attached to the right to vote, is not valid (App. 9a). The Sixth Circuit held that even in a hybrid situation where the statute is generally applicable, not aimed at particular religious practices, and free of a system of particularized exceptions, the statute is not violative of a hybrid right. They relied on a

free exercise claim when attached to the statutory right to collect unemployment compensation benefits, *Employment Div. v. Smith*, 494 U.S. 872, 877-78 (1990), the statutory right to obtain an education at a public university, *Kissinger v. Board of Trustees*, 5 F.3d 177, 179 (6th Cir. 1993), and the statutory right to obtain a building permit, *City of Boerne v. Flores*, 521 U.S. 507, 512-514 (1997).

Many times this court has held that a hybrid right is not to be regarded and/or treated in the same manner as the type of free exercise claims that were presented in *City of Boerne*, *Kissinger*, and *Smith*. The hybrid right consists of the free exercise claim along with another constitutionally protected claim such as the right of parents to educate their children, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the right to freedom of the press, *Follett v. Town of McCormick*, 321 U.S. 573 (1944), *Murdock v. Pennsylvania*, 319 U.S. 106 (1943), and the right to freedom of speech, *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

This court has consistently stated that a hybrid right involves the "Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press" (*see Smith* at 881, citing *Cantwell*, *Murdock*, etc. as above). Additionally, this court stated that "the only instances where a neutral, generally applicable law had failed to pass constitutional muster, the *Smith* court noted were cases in which other constitutional protections were at stake" (see *City of Boerne* at 513-14, citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). The courts below either have not been able, or have been unwilling, to distinguish a free exercise claim attached to another constitutionally protected right; from that of a free exercise claim attached to a statutory right. Clearly, there is a difference.

Petitioner is unable to locate a citation where this court has considered such a hybrid right, that of free exercise of religion when attached to the constitutionally protected right to vote. As this issue is material in determining Petitioner's claims regarding his most basic right to vote, this court should grant certiorari on question one (1) of this petition.

VIII.

THE DECISIONS OF THE COURTS BELOW REGARDING PETITIONER'S RIGHT TO DUE PROCESS OF LAW AND PRIVILEGES AND IMMUNITIES ARE IN CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT.

The courts below have held that Petitioner's right to due process of law and privileges and immunities have not been violated (App. 10a) because his statutory and other constitutional rights, as discussed herein, have not been violated. As this court reviews the entire matter it will reach a different conclusion upon determination that all of Petitioner's other rights have, in fact, been violated.

The courts below have relied on *Storer v. French*, 58 F.3d 1125, 1128 (6th Cir. 1995), to indicate that Petitioner's due process and privileges and immunities (Fourteenth Amendment) have not been violated where Congress has imposed or authorized the infringement (App. 10a). Also, the courts below have relied on *Hague v. Committee For Indus. Org.*, 307 U.S. 496 (1939), to indicate that Petitioner has not been discriminated against. Clearly, Petitioner's privileges and immunities, under both clauses, have been violated as a result of the incorrect and *ultra vires* findings and conclusions of the courts below.

As these issues are material in determining Petitioner's claims concerning his most basic right to vote, this court should grant certiorari on question sixteen (16) of this petition.

CONCLUSION

For the foregoing reasons, Martin S. McKay respectfully requests that his Petition For Certiorari be granted.

Respectfully Submitted,

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